Supreme Court U.S.
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No. 03-1519

In The

Supreme Court of the United States

MARLON BRAMWELL,

Petitioner,

v.

UNITED STATES BUREAU OF PRISONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 2680(c) immunizes the United States from liability under the Federal Tort Claims Act in "any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer. . . ."

The questions presented are:

(1) Whether "any other law enforcement officer" must be engaged in activities related to customs or tax collection for Section 2680(c) to immunize the United States from liability for damage to property detained by that officer, as to which the courts of appeals are in conflict.

(2) Whether a "detention" of property sufficient to trigger Section 2680(c) occurs where the law-enforcement officer possesses the property without knowledge, does not intend to deprive its owner control over it, and the property is not related to unlawful activity.

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PETITION FOR WRIT OF CERTIORARI

Marlon Bramwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit's opinion (App. 1-8) is reported at 348 F.3d 804 (9th Cir. 2003). The district court's order (App. 9-13) is unpublished.

JURISDICTION

The Ninth Circuit entered judgment on October 27, 2003, and denied Mr. Bramwell's timely petition for rehearing *en banc* on February 5, 2004 (App. 14). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

> States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

> The provisions of this chapter and section 1346(b) of this title shall not apply to –
>
> . . . Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law[.]

28 U.S.C. § 2680(c).

STATEMENT OF THE CASE

Mr. Bramwell was in the custody of Respondent United States Bureau of Prisons ("BOP") at its Lompoc, California, facility in September 2000. C.A. SER-002 ¶ 3.[1] Upon his placement in administrative segregation at that time, a BOP officer collected Mr. Bramwell's property from his cell, including his coat. C.A. SER-002 ¶ 3. Unbeknownst to the collecting officer, Mr. Bramwell's prescription eyeglasses were in the coat's pocket. C.A. SER-002 ¶¶ 5-6. The officer deposited the coat with the prison's laundry, and the eyeglasses were destroyed in the cleaning process.

After exhausting BOP's administrative claim process, Mr. Bramwell filed a complaint in the district court in July 2001 seeking damages under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"). C.A. SER-001, 004, 008.

Proceedings Below

The district court dismissed Mr. Bramwell's complaint in February 2002, holding that Section 2680(c) maintained the United States's sovereign immunity from claims resulting from damage to property detained by law enforcement officers. App. 11-12. Mr. Bramwell argued on appeal that the district court had read Section 2680(c) too broadly, that the statute actually extends sovereign immunity to a "law enforcement officer" only if the officer

[1] "C.A. SER-" refers to the page number of the cited document in Respondent's Supplemental Excerpts of the Record filed with the Ninth Circuit.

detains the property as part of a customs- or tax-related activity.

The Ninth Circuit affirmed in October 2003. The court noted that the majority of the courts of appeals have held that Section 2680(c) applies to detentions by law enforcement officers in any context, while the Sixth, Seventh, and District of Columbia Circuits have held that it applies only to detentions made in enforcement of customs or tax laws. App. 4 (citing cases). The court stated that it was "persuaded by the Fifth Circuit's reasoning in *Chapa v. United States Dep't of Justice*, in which the court held that BOP officers fell within the 28 U.S.C. § 2680(c) exception." App. 5. It was "also persuaded by the fact that BOP officers are considered 'law enforcement officers' under several other statutes. *See Chapa*, 339 F.3d at 390." App. 5.

The court also held that "detention" under Section 2680(c) does not require that the law enforcement officer take the item knowingly with intent to deprive. It reasoned:

> . . . in *Kosak v. United States* the Supreme Court broadly construed 28 U.S.C. § 2680(c) to include negligent as well as intentional conduct by government employees. The *Kosak* Court held that claims 'arising in respect of . . . the detention of any goods, merchandise, or other property' included those claims arising out of *negligent handling or storage* by federal officials. 465 U.S. at 854, 862. Neither 28 U.S.C. § 2680(c) nor *Kosak* require any specific intent or knowledge on the part of federal law enforcement officers.

App. 6 (emphasis in original). The court denied Mr. Bramwell's petition for *en banc* rehearing in February 2004. App. 14.

REASONS FOR GRANTING THIS PETITION

The Ninth Circuit's opinion increases to ten the number of courts of appeals that have specifically ruled on the type of activity that triggers sovereign immunity under Section 2680(c). Seven have held that all detentions by law enforcement officers are immunized, while three limit immunity to detentions arising out of enforcement of customs or tax laws. It is important that the Court eliminate this disparity because individuals' ability to have their FTCA claims heard should be uniform throughout the nation. It is unfair that citizens in thirty-one states cannot seek redress for damage to their detained property, while those in seven states and the District of Columbia suffering identical harm can. This geographic chasm is now even more unacceptable than in years past due to the growth of federal law enforcement activity, and the concomitant increase in property detentions.

It is also greatly important that the Court now answer the question it expressly declined to in *Kosak v. United States*, 465 U.S. 848 (1984), namely, "the meaning of the term 'detention' as used in" Section 2680(c). *Kosak*, 465 U.S. at 853 n.8. Despite the Court's expressly avoiding the question, the Ninth Circuit read *Kosak* as compelling its expansive construction of what constitutes a detention, which essentially transforms any possession of property by a law enforcement officer into a "detention" triggering

Section-2680(c) immunity. The Court should now determine the meaning of "detention" so the courts of appeals will not similarly misconstrue *Kosak* or adopt the Ninth Circuit's interpretation.

I. The Courts of Appeals are Divided On The Types of Law Enforcement Activity That Trigger Immunity Under Section 2680(c).

As the Ninth Circuit acknowledged, "[t]here is currently a split of authority among federal circuit courts of appeals regarding who is covered" by Section 2680(c). App. 4. The Sixth, Seventh, and D.C. Circuits, applying the *ejusdem generis* and *noscitur a sociis* canons of construction, have correctly held that "other law enforcement officer" refers only to law enforcement personnel acting in a customs or tax capacity. *Ortloff v. United States*, 335 F.3d 652, 660 (7th Cir. 2003); *Bazuaye v. United States*, 83 F.3d 482, 486 (D.C. Cir. 1996); *Kurinsky v. United States*, 33 F.3d 594, 598 (6th Cir. 1994). *Ejusdem generis* and *noscitur a sociis* suggest that a general term should be analyzed in the context of juxtaposed specific terms. For example,

> if a statute lists 'fishing rods, nets, hooks, bobbers, sinkers and other equipment,' . . . 'other equipment' might mean plastic worms and fishing line, but not snow shovels or baseball bats.

Bazuaye, 83 F.3d at 484 (quotation omitted).

Ortloff exemplifies the three circuits' interpretation, as well as factually resembling Mr. Bramwell's case. Ortloff was a federal prisoner seeking relief under the FTCA for damage to property while he was temporarily placed in administrative segregation. The Government argued that because Ortloff's claim arose from the detention of his

property "'by any other law enforcement officers,' to wit, the prison guards, the exception of § 2680(c) applies and therefore the government has not waived its sovereign immunity." *Ortloff*, 335 F.3d at 657. Acknowledging that "there is a split in the circuits as to the scope of § 2680(c)[,]" the Seventh Circuit "join[ed] the Sixth Circuit and D.C. Circuit and hold that the exception found in § 2680(c) applies only to law enforcement officers performing functions related to customs and excise duties." *Id.* at 658.

After citing this Court's admonition that statutes be construed as a whole, the *Ortloff* court noted that "[i]n context . . . the 'any other law enforcement officer' language conveys a drastically different meaning than in isolation, as the principles of *ejusdem generis* and *noscitur a sociis* demonstrate." *Id.* at 658-59. The court continued:

> These two principles of interpretation demonstrate that the 'any other law enforcement officer' language must be read in light of § 2680(c)'s specific reference to claims arising out of the 'collection of any tax or customs duty,' and the class of officers identified, namely 'any officer of customs or excise.' Read in this light, the 'any other law enforcement officer' language thus means any other law enforcement officers performing functions related to customs or excise. *Kurinsky*, 33 F.3d at 596-97; *Bazuaye*, 83 F.3d at 483-84.

Ortloff, 335 F.3d at 659. The Seventh Circuit also cited the FTCA's legislative history, noting that "'Congress carved out the various § 2680 exceptions, at least in part, in order to preclude tort suits against the government when other 'adequate remedies' were already available[,]'" and that such remedies had not been available for "plaintiffs

injured by federal law enforcement officers acting outside the authority of the customs and tax law." *Id.* at 659. *See also Bazuaye*, 83 F.3d at 485 (quoting S. Rep. No. 79-1400, at 33 (1946)). Finally, the court noted that the broad construction adopted by the other circuits "would render superfluous the 'any officer of customs or excise' language, since such officers would clearly be covered by the broad 'any other law enforcement officer' language." *Id.* at 659.

Conversely, the Third, Fifth, Eighth, Tenth, Eleventh, and Federal Circuits, and now the Ninth Circuit, have construed Section 2680(c) to immunize any detention by any law enforcement officer, regardless of the context in which it occurs.[2] *See Chapa v United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Hatten v. White*, 275 F.3d 1208 (10th Cir. 2001); *Cheney v. United States*, 972 F.2d 247, 248 (8th Cir. 1992); *Schrob v. Catterson*, 948 F.2d 1402, 1420 n.16 (3d Cir. 1991); *Schlaebitz v. United States Dep't of Justice*, 924 F.2d 193, 195 (11th Cir. 1991); *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988). These holdings, however, did not result from the detailed statutory interpretation the Sixth, Seventh, and D.C. Circuits utilized. Incredibly, these decisions all derive from the misinterpretation of a single case, *United States v. 1500 Cases, More or Less, Etc.*, 249 F.2d 382 (7th Cir. 1957) ("*1500 Cases*"), that did not even involve the FTCA.

1500 Cases involved an action initiated by the Government under the Food, Drug, and Cosmetic Act to seize

[2] In *Formula One Motors v. United States*, 777 F.2d 822 (2nd Cir. 1985), the Second Circuit specifically declined to decide the issue. *See Formula One Motors*, 777 F.2d at 823-24.

goods. *1500 Cases*, 249 F.2d at 383. The owner alleged that the district court had relied upon the FTCA *sub silentio* as authority to award him costs. *See 1500 Cases*, 249 F.2d at 384. The Seventh Circuit responded that there had been no FTCA claim before the district court, and that it was "doubtful" that it was even mentioned. *Id.* The court then proceeded, "[a]ssuming . . . the theory now advanced is properly before us[,]" to raise Section 2680(c) in *dictum*. *See id.* In *Ortloff*, the Seventh Circuit confirmed that its "reference to § 2680(c)" in *1500 Cases* "was in passing, and not dispositive of the case." *Ortloff*, 335 F.3d at 657 n.5.

Nevertheless, the inapposite discussion of Section 2680(c) in *1500 Cases* was the seed from which the current majority rule on its interpretation blossomed. The evolution commenced in 1979 in *United States v. Lockheed L-188 Aircraft*, 656 F.2d 390 (9th Cir. 1979) ("*Lockheed*"), where the Ninth Circuit cited *1500 Cases* as authority for its application of Section 2680(c). *See Lockheed*, 656 F.2d at 397. *Lockheed* and *1500 Cases* were then cited by the Tenth Circuit in 1984 in *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1491 (10th Cir. 1984) ("*2,116 Boxes*"). In 1988, the Federal Circuit relied on *2,116 Boxes*, *Lockheed*, and *1500 Cases* in *Ysasi*. *See Ysasi*, 856 F.2d at 1525. In 1991, the Eleventh Circuit followed suit in *Schlaebitz*, citing *Ysasi* and *2,116 Boxes*. *See Schlaebitz*, 924 F.2d at 194-95. In 1992, the Fifth Circuit cited *Schlaebitz*, *Ysasi*, and *2,116 Boxes* in *Halverson v. United States*, 972 F.2d 654, 656 (5th Cir. 1992). Also in 1992, the Eighth Circuit cited *Schlaebitz* in *Cheney*. *See Cheney*, 972 F.2d at 248. In 2001 in *Hatten*, the Tenth Circuit cited a district court's reliance on *Halverson*'s citation to *Schlaebitz*, *Ysasi*, and *2,116 Boxes*. *See Hatten*, 275 F.3d at 1210

(citing *Crawford v. United States Dep't of Justice*, 123 F.Supp.2d 1012, 1013 (S.D. Miss. 2000)). In 2003, the Fifth Circuit relied on *Halverson* and cited *Schlaebitz*, *Ysasi*, *2,116 Boxes*, and *Lockheed*. *See Chapa*, 339 F.3d at 390. Finally, in Mr. Bramwell's case the Ninth Circuit relied on *Chapa* and *Lockheed*. *See* App. 4-5. Unlike *Ortloff*, *Bazuaye*, and *Kurinsky*, each of these cases simply cited *1500 Cases* or one or more of its progeny to support its holding. *See Ortloff*, 335 F.3d at 659-60; *Kurinsky*, 33 F.3d at 598 (both discussing the analyses of the opinions enunciating the majority rule).

It would be miraculous if this split of opinion were resolved without the Court announcing Section 2680(c)'s proper construction. Given the numerical disparity between the majority-rule and minority-rule courts, harmonization would be more likely mathematically if the three minority-rule circuits switched positions than the seven majority-rule circuits. Indeed, the Ninth Circuit's express rejection of the minority view in Mr. Bramwell's case, and its subsequent denial of his petition for *en banc* rehearing, establishes that at least one majority-rule circuit would hold out. *See* App. 4-5, 14. As such, the courts reconciling their positions is extremely unlikely. The Sixth, Seventh, and D.C. Circuits are unlikely to retreat from their analyses, given that the Sixth and Seventh Circuits criticized the cases enunciating the majority view as not persuasive, and the D.C. Circuit concurred with the Sixth Circuit's analysis. *See Ortloff*, *Bazuaye*, and *Kurinsky*, all *supra*.

Mr. Bramwell's petition may provide the Court the only opportunity to resolve the conflict in the fore seeable future. FTCA claims to which Section 2680(c) is potentially applicable are typically prosecuted *pro se*. *See, e.g.*, *Chapa*, 339 F.3d at 388; *Hatten*, 275 F.3d at 1209;

Halverson, 972 F.2d at 654; *Cheney*, 972 F.2d at 248. The absence of counsel increases the likelihood that the courts of appeals will dispose of the claims without a well-reasoned precedential opinion, and makes it unlikely that the Court will receive a petition for a writ of *certiorari* that adequately articulates the legal issues, if it receives any petition at all.

II. The Court Should Now Authoritatively Determine What Constitutes a "Detention" That May Trigger Immunity Under Section 2680(c).

The Ninth Circuit's reliance on the Court's analysis in *Kosak* illustrates the need for the Court to take up the question it tabled in *Kosak*: the meaning of "detention" in Section 2680(c).

The question presented in *Kosak* was

> whether [Section] 2680(c) . . . precludes recovery against the United States for injury to private property sustained during a temporary detention of the property by the Customs Service.

Kosak, 465 U.S. at 849. The petitioner's property was detained by the Customs Service in conjunction with his being charged with smuggling it into the United States. *Id.* The property was returned after he was acquitted; he subsequently alleged that it had been damaged while in custody. Before the Court, he argued that Section 2680(c) should bar suit only "'for damage caused by the detention itself and not for the negligent . . . destruction of property while it is in the possession of the customs service.'" *Id.* at 852. The Court rejected the argument, holding that Section 2680(c) barred FTCA litigation in "any claim 'arising out of' the detention of goods, and includes a claim resulting from

negligent handling or storage or detained property." *Id.* at 854. Thus, the Court's holding was that Section 2680(c) immunizes the Government from any FTCA claim based on harm caused by the detention, physical or otherwise. *See id.* As noted above, the Court expressly declined to address what precisely constitutes a "detention." *Id.* at 853 n.8.

Mr. Bramwell argued below that the Ninth Circuit should interpret "detention" to exclude situations where the law enforcement officer was unaware that he or she possessed the individual's property and, accordingly, did not intend to deprive the individual of control over it. *See* App. 6. Rejecting the argument, the Ninth Circuit found *Kosak* controlling because "the *Kosak* Court held that claims 'arising in respect of . . . the detention of any [. . .] property' included those claims arising out of *negligent handling or storage* by federal officials." App. 6 (citing *Kosak*, 465 U.S. at 854, 862) (emphasis in original). This statement is an accurate general summary of *Kosak*'s holding, but the court's use of it to reject Mr. Bramwell's argument necessarily presupposes that ***every*** possession of property by a law enforcement officer is a "detention." Even if one were to assume that the Court was not serious when it said in *Kosak* that it was not addressing the meaning of "detention," nothing in the Court's opinion supports such a presumption.

Interpreting "detention" in Section 2680(c) to encompass any unknowing possession of property, or mere possession without an intent to deprive its owner control, would be inconsistent with Section 2680(c)'s context and purpose, which demonstrate Congress's intent to maintain sovereign immunity where law enforcement officers, either in customs or excise context or universally, take control of

a suspect's property due to its potential relationship to unlawful activity. *See* 28 U.S.C. § 2680(c); *Kosak*, 465 U.S. at 854 n.9 (admonishing that the FTCA's exceptions should not be so broadly construed as to defeat the statute's purpose). The Court should now definitively define "detention" so other courts of appeals do not follow the Ninth Circuit's lead and transform unintended possession into "detentions."

III. Resolution of These Questions Is Nationally Important In Light Of Growing Federal Law Enforcement Responsibilities.

The Seventh Circuit aptly observed in *Ortloff*

> the potential number of federal law enforcement officers in our modern government's alphabet soup – i.e., the DEA, EPA, FBI, FDA, FTC, INS, OSHA, SEC, or USDA, to name a few.

Ortloff, 335 F.3d at 659. Another agency that may vest its personnel with law enforcement authority is the Transportation Security Administration ("TSA"). *See* 49 U.S.C. § 114(q) (empowering under secretary of transportation for security to designate TSA employees as "a law enforcement officer."); 49 C.F.R. § 1542.215(a)(2) (2003) (verifying that TSA employees may "provide[] Federal law enforcement support" for "screening persons and accessible property"). Although a relatively small number of individuals may be subject to scrutiny by many of these agencies, millions will come into contact with TSA personnel every year. For example, there were over 570,000,000 boardings at the sixty-eight busiest commercial airports in 2002. *See* "CY 2002 Commercial Service Airports in the US with % Boarding Changes from 2001" (Nov. 6, 2003),

available at http://www.faa.gov/arp/planning/stats/2002/CY02CommSerBoard.pdf (last accessed May 4, 2004). Even if property damage occurs in a very small percentage of instances, this volume of interaction between TSA personnel and travelers could result in a significant number of individuals potentially precluded from seeking FTCA relief in majority-rule circuits. *See* 28 U.S.C. §§ 1346(b)(1) (FTCA waives immunity for both "negligent" and "wrongful" acts by government employees), 2680(c).

As the federal law enforcement function continues to expand, possession of personal property by federal officers will correspondingly increase. Individuals who have committed no wrong should have access to a potential financial remedy, to the extent Congress has permitted, when the Government invokes its law enforcement powers and damage to their property results. The vast majority of Americans will continue to have no such opportunity if the majority rule stands, while their fellow citizens in the District of Columbia and the states constituting the Sixth and Seventh Circuits who have been equally wronged will have access to the courthouse. It is therefore important for the Court to resolve the questions presented so citizens will have equal ability to invoke the FTCA notwithstanding where they live.

CONCLUSION

The Court should grant this petition so it can resolve these important issues.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Marlon Bramwell, *Plaintiff-Appellant,* v. U.S. Bureau of Prisons, *Defendant-Appellee.*	No. 02-55516 D.C. No. CV-01-02626-GHK OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted
October 7, 2003 – Pasadena, California

Filed October 27, 2003

Before: Pamela Ann Rymer and Richard C. Tallman, Circuit Judges, and Ronald B. Leighton,* District Judge.

Opinion by Judge Tallman

COUNSEL

Daniel D. Wedemeyer, Wedemeyer & Prangley, Santa Clara, California, for the plaintiff-appellant.

Vince Farhat, Assistant United States Attorney, Los Angeles, California, for the defendant-appellee.

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* Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

TALLMAN, Circuit Judge:

We must decide whether the seizure and inadvertent destruction of an inmate's property by correctional officers gives rise to a cause of action against the U.S. Bureau of Prisons (BOP) under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, et seq. We hold that the seizure in this case was a "detention" of goods by federal law enforcement officers under the exception to FTCA liability set forth in 28 U.S.C. § 2680(c). We affirm the district court's ruling and join the majority of circuits that have similarly interpreted this subsection.

The district court dismissed federal prisoner Marlon Bramwell's FTCA claim against the BOP for lack of subject matter jurisdiction. On appeal, Bramwell contends that: (1) the FTCA waives sovereign immunity for claims of property damage by BOP officers; (2) a "detention of goods" occurs only if officers knowingly and intentionally detain a person's property; (3) the district court erred by denying his motion to amend his pleadings to substitute the United States as the defendant; and (4) the district court improperly denied his motion for reconsideration.

I

After Bramwell was moved to administrative segregation at a federal prison, BOP officers cleared out his property from his old cell and sent his overcoat to the prison laundry, unaware that a $290 pair of designer prescription eyeglasses remained in the coat pocket. When Bramwell learned that his eyeglasses had been damaged, and that the prison would not refund the full cost, he sued the BOP under the FTCA.

The district court dismissed Bramwell's action on the ground that the United States had not waived its sovereign immunity under the FTCA's "detention of goods" exception, 28 U.S.C. § 2680(c). The court denied as futile Bramwell's motion to amend his complaint to substitute the United States as the defendant and also denied his subsequent request for reconsideration. This appeal followed.

II

A

We review de novo the district court's dismissal for lack of subject matter jurisdiction. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000).

The United States may not be sued unless the government has waived its sovereign immunity. *Balser v. Dep't of Justice*, 327 F.3d 903, 907 (9th Cir. 2003) (citing *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)). The FTCA is such a waiver, and it grants subject matter jurisdiction to federal courts for claims that arise from certain tortious conduct by government employees. *See* 28 U.S.C. § 1346(b)(1).

However, the FTCA's broad waiver of sovereign immunity is subject to thirteen specific exceptions. *See* 28 U.S.C. §§ 2680(a)-(n). The district court found that its jurisdiction over Bramwell's suit was barred by the "detention of goods" exception, which retains the government's immunity from *"[a]ny claim arising in respect of* the assessment or collection of any tax or customs duty, or *the detention of any goods, merchandise, or other property by* any officer of customs or excise or *any other law enforcement officer."* *See* 28 U.S.C. § 2680(c) (emphasis added).

The U.S. Supreme Court has not determined whether "other law enforcement officers" under § 2680(c) include BOP personnel. *See Kosak v. United States,* 465 U.S. 848, 852 n.6 (1984). There is currently a split of authority among federal circuit courts of appeals regarding who is covered. The majority of our sister circuits read § 2680(c) expansively to include federal law enforcement officers beyond those who assess taxes or collect customs duties. *See, e.g., Chapa v. United States Dep't of Justice,* 339 F.3d 388, 390 (5th Cir. 2003) (BOP officers); *Hatten v. White,* 275 F.3d 1208, 1210 (10th Cir. 2002) (BOP officers); *Halverson v. United States,* 972 F.2d 654, 656 (5th Cir. 1992) (Border Patrol officers); *Cheney v. United States,* 972 F.2d 247, 248 (8th Cir. 1992) (drug task force agents); *Schrob v. Catterson,* 948 F.2d 1402, 1420 n.16 (3d Cir. 1991) (DEA agents); *Schlaebitz v. United States Dep't of Justice,* 924 F.2d 193, 195 (11th Cir. 1991) (U.S. Marshals); *Ysasi v. Rivkind,* 856 F.2d 1520, 1525 (Fed. Cir. 1988) (Border Patrol officers); *United States v. 2,116 Boxes of Boned Beef,* 726 F.2d 1481, 1491 (10th Cir. 1984) (USDA inspection agents). The minority view, espoused by the Sixth, Seventh, and D.C. Circuits, applies § 2680(c) narrowly to include only federal officers engaged in tax or customs duties. *See Ortloff v. United States,* 335 F.3d 652, 660 (7th Cir. 2003) (BOP officers not included); *Bazuaye v. United States,* 83 F.3d 482, 486 (D.C. Cir. 1996) (postal inspectors not included); *Kurinsky v. United States,* 33 F.3d 594, 598 (6th Cir. 1994) (FBI agents not included).

Our circuit has previously endorsed the broader interpretation of § 2680(c), and we have extended this exception to law enforcement officers other than those engaged in tax or customs-related duties. In *United States v. Lockheed L-88 Aircraft,* we held that FAA agents were

"other law enforcement officer[s.]" 656 F.2d 390, 397 (9th Cir. 1979).

We are also persuaded by the Fifth Circuit's reasoning in *Chapa v. United States Dep't of Justice,* in which the court held that BOP officers fell within the 28 U.S.C. § 2680(c) exception. 339 F.3d at 390. The *Chapa* court noted that although the phrase "law enforcement officer" is not defined in § 2680(c), it *is* defined in one of the other thirteen exceptions to the FTCA. *Id; see* 28 U.S.C. § 2680(h) (describing a "law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."). The U.S. Supreme Court has specifically held that intentional misconduct by BOP officers gives rise to a cause of action under § 2680(h). *Carlson v. Green,* 446 U.S. 14, 20 (1980). Because the phrase "law enforcement officer" appears in neighboring subsections (c) and (h), the phrase should be construed similarly in cases arising under both exceptions. *See U.S. West Comm. v. Hamilton,* 224 F.3d 1049, 1053 (9th Cir. 2000) (citing *Erlenbaugh v. United States,* 409 U.S. 239, 244 (1972) (holding that words in different sections of the same statute should be similarly construed under the canon of *in pari materia*)).

We are also persuaded by the fact that BOP officers are considered "law enforcement officers" under several other statutes. *See Chapa,* 339 F.3d at 390. BOP employees are "law enforcement officers" under 5 U.S.C. §§ 5541(3), 8331(20) and 8401(17)(D)(i) (civil service benefits eligibility); 42 U.S.C. § 3796b(6) (public safety officers' death benefits); and 18 U.S.C. § 3592(c)(14)(D) and 21 U.S.C. § 848(e)(2) (authorizing the federal death penalty for killing a "law enforcement officer").

Therefore, consistent with the more expansive view of our circuit and most other circuits who have opined on the issue, we hold that BOP officers are "law enforcement officers" exempt from FTCA liability for damage to detained goods under 28 U.S.C. § 2680(c).

B

Bramwell also argues that the BOP officers did not "detain" his property within the meaning of § 2680(c) because they were not aware that his eyeglasses were in their possession. Bramwell contends that a "detention" occurs only when officers knowingly and intentionally take control of a person's property.

However, in *Kosak v. United States* the Supreme Court broadly construed 28 U.S.C. § 2680(c) to include negligent as well as intentional conduct by government employees. The *Kosak* Court held that claims "arising in respect of . . . the detention of any goods, merchandise, or other property" included those claims arising out of *negligent handling or storage* by federal officials. 465 U.S. at 854, 862. Neither 28 U.S.C. § 2680(c) nor *Kosak* require any specific intent or knowledge on the part of federal law enforcement officers.

In this case, it is clear that the BOP officers intended to detain Bramwell's overcoat and his other personal belongings until such time as they would be returned to him, and that Bramwell's eyeglasses were damaged as a result of the negligent handling and storage of these belongings. We see no ambiguity in the term "detention" as Bramwell insists. We conclude that the BOP officers "detained" Bramwell's eyeglasses under 28 U.S.C. § 2680(c).

C

Because we find that the exemption under 28 U.S.C. § 2680(c) applies, the district court properly denied as futile Bramwell's request to amend his complaint to substitute the United States for the BOP as the named defendant. *See Bonin v. Calderon,* 59 F.3d 815, 845 (9th Cir. 1995) (noting that futility of a proposed amendment can justify denial of a motion to amend). Bramwell's requested amendment would have been futile because his claim would still be barred by 28 U.S.C. § 2680(c) even if the United States was the defendant. *See Thomas-Lazear v. FBI,* 851 F.2d 1202, 1206-07 (9th Cir. 1988) (upholding a district court's decision to deny adding the United States as a defendant because plaintiff's claim was barred by an exception to the FTCA).

D

Because Bramwell's claim falls within the 28 U.S.C. § 2680(c) exception and his motion to substitute defendants was futile, the district court did not abuse its discretion by denying Bramwell's motion for reconsideration. *See Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted).

III

The BOP officers' actions fall within an exception to the government's waiver of sovereign immunity under the FTCA, because they are "law enforcement officers" under 28 U.S.C. § 2680(c) and the alleged negligence resulting in damage occurred while Bramwell's personal property was

detained. The district court properly dismissed Bramwell's complaint for lack of subject matter jurisdiction.

AFFIRMED.

APPENDIX B

ORIGINAL

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No.: CV-01-02626-GHK (RCx) **Date:** February 5, 2002

Title: Marlon Bramwell v. Bureau of Prisons

DOCKET ENTRY

PRESENT: Hon. *George H. King*, United States District Judge

Beatrice Herrera	None
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS: Defendant's Rule 12(b) (1) Motion to Dismiss for Lack of Subject Matter Jurisdiction; Plaintiff's Rule 15 Motion to Amend

I. Background

On July 17, 2001, Plaintiff instituted this action in proper to recover the value of eyeglasses which were "inadvertently" destroyed by a Bureau of Prisons ("BOP") employee. Compl. ¶¶ 6-7. The BOP employee

had collected Plaintiff's eyeglasses along with other personal property following his Administrative Segregation at the Lompoc Federal Penitentiary. *Id.* ¶ 3. Plaintiff claims we have jurisdiction pursuant to 28 U.S.C. § 1346(b) and the Federal Tort Claims Act ("FTCA") § 2671 et. seq.

On January 4, 2002, Defendant moved to dismiss the complaint for lack of subject matter jurisdiction. The motion is opposed and Defendant has replied. In addition, on January 17, 2002, Plaintiff moved to amend his pleadings to substitute the United States for the BOP as Defendant. Though the latter motion is not fully briefed, we nevertheless find both appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7-15 (formerly Local Rule 7.11). After considering all pertinent papers, we rule as follows:

II. Defendant's Rule 12(b) (1) Motion to Dismiss

Defendant moves to dismiss the complaint because the United States has not waived its sovereign immunity with respect to Plaintiff's claim and because the BOP cannot be sued directly. Since Plaintiff has sought to substitute the United States for the BOP, we begin with the issue of sovereign immunity.

A. Standard of Review

As a court of limited jurisdiction, we presumptively lack jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1993). Though we construe pro per pleadings liberally, *See e.g., Haines v. Kerner,* 404 U.S. 519, 520 (1972); *Morrison v. Hall,* 261 F.3d 896, 899 n.2

(9th Cir. 2001), as the complaining party, Plaintiff must identify a basis for federal jurisdiction. *See Kokkonen*, 511 U.S. at 377; *see also* Local Rule 8-1.

B. Sovereign Immunity

The United States is ordinarily immune from suit and controls the conditions under which actions can be maintained against it. 16 Moore's Federal Practice § 105.21[1], at p. 105-19 (*citing United States v. Dalm*, 494 U.S. 596, 608 (1990)). Sovereign immunity acts as a jurisdictional bar to unauthorized actions; consent to suit is a jurisdictional prerequisite. *Id.* at p. 105-20 (*citing United States v. Mitchell*, 463 U.S. 206 (1983)); *see also, e.g., Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999).

C. Federal Tort Claims Act

Plaintiff alleges his eyeglasses were "inadvertently" destroyed by a BOP official. Under the FTCA, the United States may be held civilly liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b) (granting district courts exclusive jurisdiction to entertain claims for damages against the United States for "injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government. . . ."). Waiver pursuant to the FTCA is subject to several exceptions. *See* 28 U.S.C.§ 2680(a) - (n). Claims falling within one of those exceptions remain barred by the doctrine of sovereign immunity.

28 U.S.C. § 2680(c) excludes FTCA recovery for "[a]ny claim arising in respect of the assessment or collection of

any tax or custom duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." Inmate claims against the BOP for personal property lost or damaged as the result of the BOP's negligent acts or omissions fall within 28 U.S.C.§ 2680(c). *See Hatten v. White*, 2002 U.S. App. LEXIS 261 (10th Cir. January 3, 2002); *Wilson v. United States*, 2001 U.S. Dist. LEXIS 9652 (D. Kan. June 26, 2001); *Hatten v. White*, 2001 U.S. Dist. LEXIS 3622 (D. Kan. February 27, 2001); *Crawford v. United States Dep't of Justice*, 123 F. Supp.2d 1012 (S.D. Miss. 2000); *Johnson v. United States*, 2000 U.S. Dist. LEXIS 9815 (D. Kan. June 27, 2000); *Dennison v. United States*, 2000 U.S. Dist. LEXIS 1922 (D. Kan. January 14, 2000); *Farmer v. Jacobsen*, 1998 U.S. Dist. LEXIS 20846 (D. Minn. November 30, 1998); *Hernandez v. Hawks*, 1995 U.S. Dist. LEXIS 17580 (D. Minn. September 13, 1995).

In light of these authorities, Plaintiff's complaint seeks damages for alleged conduct squarely within § 2680 (c). While the above-cited authorities are not binding, they are consistent with the Ninth Circuit's practice of construing statutes waiving sovereign immunity "strictly in favor of the sovereign." *Gasho v. United States*, 39 F.3d 1420, 1433 (9th Cir. 1994) (*quoting McMahon v. United States*, 342 U.S. 25, 27 (1951)). As the United States has not waived its sovereign immunity with respect to Plaintiff's sole claim, we lack jurisdiction to entertain this action.

III. Disposition

Accordingly, Defendant's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**, without prejudice. Insofar as substituting the United States for the BOP

would not create subject matter jurisdiction, Plaintiff's motion to amend is **DENIED** as moot.

IT IS SO ORDERED.

MINUTES FORM 11
CIVIL-GEN

Initials of Deputy Clerk [Initials]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLON BRAMWELL, **Plaintiff - Appellant,** **v.** **U.S. BUREAU OF PRISONS,** **Defendant - Appellee**	**No. 02-55516** **D.C. No. CV-01-02626-GHK** **ORDER** **(Filed: Feb. 5, 2004)**

Before: RYMER and TALLMAN, Circuit Judges, and LEIGHTON,* District Judge.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED.**

* Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

FILED
JUN 9 - 2004

No. 03-1519

In the Supreme Court of the United States

MARLON BRAMWELL, PETITIONER

v.

UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under 28 U.S.C. 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The questions presented are:

1. Whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity.

2. Whether the term "detention" requires that the property be seized knowingly and intentionally.

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In the Supreme Court of the United States

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MARLON BRAMWELL, PETITIONER

v.

UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 348 F.3d 804. The order of the district court (Pet. App. 9-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2003. A petition for rehearing was denied on February 5, 2004 (Pet. App. 14). The petition for a writ of certiorari was filed on May 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1946, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, waives the sovereign immunity of the United States with respect to certain tort suits, and renders it liable in damages to the same extent as a private party for injuries caused by the tortious acts of federal employees, subject to certain restrictions and limitations. Section 2680 contains a list of claims to which the FTCA does not apply. One type of excluded claim, described in subsection (c), is "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." Section 2680(c) also contains an exception to that exclusion. It provides that the FTCA does apply to

> any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—
>
> (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> (2) the interest of the claimant was not forfeited;
>
> (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

2. Petitioner is a prisoner in the custody of the United States Bureau of Prisons (BOP). According to the allegations in his complaint, BOP officers at the United States Penitentiary in Lompoc, California, took property from his cell when he was placed in administrative segregation in September 2000. Petitioner alleges that the property included an overcoat; that, unbeknownst to the BOP officers, there were eyeglasses in the coat's pocket; and that the glasses were damaged when the coat was sent to the laundry. Petitioner sued the BOP to recover the value of the glasses. Pet. 3; Pet. App. 2, 9-10.

3. The district court dismissed the complaint for lack of jurisdiction. Pet. App. 9-13. It held that "[i]nmate claims against the BOP for personal property lost or damaged as the result of the BOP's negligent acts or omissions fall within 28 U.S.C. § 2680(c)," *id.* at 12, and that petitioner's claim thus "remain[s] barred by the doctrine of sovereign immunity," *id.* at 11, which is a "jurisdictional bar" to suit, *ibid.* In granting the motion to dismiss, the district court denied, as moot, petitioner's motion to amend his complaint to substitute the United States for the BOP as defendant, finding that such an amendment "would not create subject matter jurisdiction." *Id.* at 13. The court later denied petitioner's motion for reconsideration. *Id.* at 3.

4. The court of appeals affirmed. Pet. App. 1-8.

a. The court first held that the detention-of-goods exception to the FTCA's waiver of sovereign immunity extends to "law enforcement officers other than those

engaged in tax or customs-related duties," Pet. App. 4, and that 28 U.S.C. 2680(c) thus covers actions by BOP personnel. Pet. App. 3-6. In so holding, the court noted that it had previously held that agents of the Federal Aviation Administration were "other law enforcement officer[s]" under 28 U.S.C. 2680(c). Pet. App. 4-5 (citing *United States* v. *Lockheed L-188 Aircraft*, 656 F.2d 390, 397 (9th Cir. 1979)). The court also relied (*id.* at 5) on the definition of "law enforcement officer" under another statutory exception to FTCA liability, see 28 U.S.C. 2680(h) ("any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law"), and on the fact that "BOP officers are considered 'law enforcement officers' under several other statutes," Pet. App. 5 (citing 5 U.S.C. 5541(3), 8331(20), 8401(17)(D)(i); 18 U.S.C. 3592(c)(14)(D); 21 U.S.C. 848(e)(2); and 42 U.S.C. 3796b(6)).

b. The court of appeals also rejected petitioner's contention that, under 28 U.S.C. 2680(c), "a 'detention' occurs only when officers knowingly and intentionally take control of a person's property," and that, because the BOP officers "were not aware that [petitioner's] eyeglasses were in their possession," there was accordingly no detention here. Pet. App. 6. In rejecting that contention, the court relied on this Court's decision in *Kosak* v. *United States*, 465 U.S. 848 (1984), which held that Section 2680(c) covers "claims arising out of *negligent handling or storage* by federal officials." Pet. App. 6 (citing 465 U.S. at 854, 862). The court of appeals observed that the BOP officers "intended to detain [petitioner's] overcoat and his other personal belongings until such time as they would be returned to him," and that petitioner's eyeglasses were allegedly damaged "as a result of the negligent handling and

storage of these belongings." *Ibid.* That conduct, according to the court, amounts to the "detention" of petitioner's glasses under Section 2680(c). *Ibid.*[1]

ARGUMENT

1. Petitioner contends (Pet. 6-11) that the term "other law enforcement officer" in 28 U.S.C. 2680(c) is limited to officers acting in a tax, excise, or customs capacity. The court of appeals correctly held otherwise, and no decision interpreting the current version of Section 2680(c) has reached a contrary conclusion. Further review is therefore unwarranted.

a. Section 2680(c) deprives courts of jurisdiction to consider claims arising in respect of "the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The court of appeals correctly held that that broad language covers petitioner's claim. As far as the identity of the detaining official is concerned, Section 2680(c) applies not only to "any officer of customs or excise" but to "any other law enforcement officer"; a BOP officer fits that description. As far as the nature of the detained item is concerned, Section 2680(c) applies not only to "goods" or "merchandise" but to "other property"; a prisoner's eyeglasses fit that description. Under a straightforward interpretation of the statutory language, therefore, Section 2680(c) applies to the conduct at issue here.

b. Contrary to petitioner's contention (Pet. 6-11), the court of appeals' decision does not conflict with the

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[1] The court of appeals also held that the district court "properly denied as futile [petitioner's] request to amend his complaint to substitute the United States for the BOP as the named defendant" and that the district court "did not abuse its discretion by denying [petitioner's] motion for reconsideration." Pet. App. 7.

decision of any other court of appeals. The cases holding that Section 2680(c) is limited to detentions by an officer acting in a tax, excise, or customs capacity, *Ortloff* v. *United States*, 335 F.3d 652, 657-660 (7th Cir. 2003), cert. denied, 124 S. Ct. 1520 (2004); *Bazuaye* v. *United States*, 83 F.3d 482, 483-486 (D.C. Cir. 1996); *Kurinsky* v. *United States*, 33 F.3d 594, 596-598 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995), all interpreted the version of Section 2680(c) in effect before Congress amended it in April 2000, through the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 3(a), 114 Stat. 211. See *Ortloff*, 335 F.3d at 657 n.2 (expressly stating that court was construing pre-CAFRA version of Section 2680(c)); *Bazuaye*, 83 F.3d at 483 (discussing pre-CAFRA version of Section 2680(c)); *Kurinsky*, 33 F.3d at 596 (same). As far as we are aware, every court of appeals that has addressed the issue under the current version of Section 2680(c) has concluded, in agreement with the court below, that it extends to detentions by a law enforcement officer acting outside the tax, excise, and customs contexts. See *Chapa* v. *United States Dep't of Justice*, 339 F.3d 388, 390 (5th Cir. 2003); *Hatten* v. *White*, 275 F.3d 1208, 1210 (10th Cir. 2002); *O'Ferrell* v. *United States*, 253 F.3d 1257, 1271 (11th Cir. 2001). Indeed, two of those three courts, like the court below, have so held in a case involving BOP employees. See *Chapa*, 339 F.3d at 389; *Hatten*, 275 F.3d at 1209-1210.

Nor are the courts that have narrowly interpreted the prior version of Section 2680(c)—the District of Columbia, Sixth, and Seventh Circuits—certain to interpret the current version the same way, because the two versions differ in respects that are relevant to the issue here. As it existed before the CAFRA amendments, Section 2680(c) provided, in its entirety,

that the FTCA does not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. 2680(c) (1994). CAFRA amended the statute in two ways.

First, while the prior version provided that the FTCA does not apply to a claim arising out of the detention of "any goods or merchandise," 28 U.S.C. 2680(c) (1994), the amended version provides that the FTCA does not apply to a claim arising out of the detention of "any goods, merchandise, *or other property*," 28 U.S.C. 2680(c) (emphasis added). Because the amended version includes the phrase "other property," it would be difficult for a court to construe the term "other law enforcement officer" narrowly on the theory that the only officers who detain "goods or merchandise" are those who are acting in a tax, excise, or customs capacity.

Second, unlike the prior version, the amended statute contains an exception to its general exclusion for certain detentions made in connection with asset-forfeiture laws, which makes clear that the FTCA applies to claims arising in respect of such detentions. See 28 U.S.C. 2680(c)(1)-(4). This exception to the exclusion presupposes that the exclusion generally exempts forfeitures by law-enforcement officers from the FTCA's coverage. And since federal agents are empowered to seize and forfeit goods in a variety of circumstances, not just when they are acting in a tax, excise, or customs capacity, see *e.g.*, 18 U.S.C. 981; 21 U.S.C. 334, 881, the exception added by CAFRA reinforces the view that a broad group of law-enforcement agents are presumptively excepted from the FTCA's coverage (subject to

the exceptions to the exclusion in the CAFRA amendments).

Apart from what the CAFRA amendments themselves suggest, the legislative history of those amendments indicates that Congress wanted to provide a remedy for certain damages caused by the detention of goods by law-enforcement officers outside the tax, excise, and customs contexts. The Report of the House Judiciary Committee explained that, because the government was "exempted from liability under the Federal Tort Claims Act for damage to property while detained by law enforcement officers," H.R. Rep. No. 192, 106th Cong., 1st Sess. 18 (1999), there was no remedy under federal law for damage to a private airplane seized by agents of the Drug Enforcement Administration as part of a domestic drug-trafficking investigation, *id.* at 8-9. That concern would have been misplaced if Section 2680(c)'s exception applied only to tax, excise, and customs seizures.

Review is unwarranted, in short, because the District of Columbia, Sixth, and Seventh Circuits have not had an opportunity to address the effect of the CAFRA amendments on their decisions interpreting the prior version of Section 2680(c). Perhaps for the same reason, this Court has repeatedly denied certiorari in cases presenting the question whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity. In fact, it has done so at least four times in the last 14 months alone. See *Conrod* v. *Moore*, No. 03-8804 (June 14, 2004); *Greer* v. *United States*, No. 03-9002 (June 7, 2004); *Ames* v. *Pontesso*, 538 U.S. 1058 (2003); *Miller* v. *United States*,

538 U.S. 1036 (2003). There is no reason for a different result here.[2]

2. Petitioner also contends (Pet. 11-13) that Section 2680(c) is inapplicable to his claim because a "detention" must be knowing and intentional and the BOP officers were allegedly unaware that petitioner's eyeglasses were in his overcoat when they removed the coat from his cell. Because the court of appeals correctly held otnerwise, and because its decision does not conflict with any decision of any other court, further review of this claim is also unwarranted.

In *Kosak* v. *United States*, 465 U.S. 848 (1984), this Court held that Section 2680(c) applies not only to claims for damage to property caused by the detention itself but also to claims for damage caused by the "negligent handling or storage" of property. *Id.* at 854. Even if a "detention" must be intentional, that holding covers this case. As the court of appeals explained, the BOP officers "intended to detain" the "personal belongings" in petitioner's cell until they could be returned, and his glasses were allegedly damaged "as a result of the negligent handling and storage of these belongings." Pet. App. 6. While the officers may not have known what was in the pockets of petitioner's coat, they certainly intended to detain both the coat and anything left in its pockets (as well as the other personal property in his cell). Petitioner identifies no valid interpretive—or even policy—basis for the view that Section 2680(c) is inapplicable to any portion of the contents of a container of which the seizing agent is

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[2] The same issue is raised in another petition now pending before the Court. See *Corbeil* v. *United States*, No. 03-9719 (filed Apr. 2, 2004).

unaware, and he cites no decision of any court that has adopted that view.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner does contend that interpreting "detention" in Section 2680(c) to encompass the unknowing possession of property is inconsistent with "Congress' intent to maintain sovereign immunity where law enforcement officers * * * take control of a suspect's property due to its potential relationship to unlawful activity." Pet. 12-13. But that is not the only circumstance in which officers take control of property. Indeed, in this very case, petitioner's coat was removed from his cell, not because of any "potential relationship to unlawful activity," Pet. 13, but because he was being placed in administrative segregation, Pet. 3; Pet. App. 2, 10. In any event, even an officer who takes control of a container because of its "potential relationship to unlawful activity," Pet. 13, may not be aware of all of its contents, at least initially.

(3)

No. 03-1519

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

MARLON BRAMWELL,

Petitioner,

v.

UNITED STATES BUREAU OF PRISONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Mr. Bramwell discussed in his petition the deep split among the courts of appeals, enhanced by the Ninth Circuit's erroneous analysis, on the scope of the "other law enforcement officer" provision in 28 U.S.C. § 2680(c). The Government asserts that there really is no split, contending that the enactment of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") created a jurisprudential *tabula rasa* on Section 2680(c)'s proper construction. The Government also asserts that the Court need not enunciate the reach of "detention" in Section 2680(c) because it is clear that the prison officer "intended to detain" all of Mr. Bramwell's property. Neither argument is correct.

I. The 2000 Amendment To Section 2680(c) Did Not Change Or Affect The Language At Issue In This Case, Which Gives Rise To The Conflict In The Circuits.

The Government claims that the amendment of Section 2680(c) by CAFRA, Pub. L. No. 106-185, § 3(a), 114 Stat. 202, 211 (2000), eliminated the deep division among the courts of appeals on the reach of "other law enforcement officer" immunity. Brief in Opposition ("Br. in Opp.") at 5-9. Its theory is grounded on the uniformity of the appellate decisions involving post-CAFRA Section 2680(c), and the absence of decisions addressing the post-CAFRA language from the Sixth, Seventh, and D.C. Circuits, which construed Section 2680(c)'s original language to limit immunity to law-enforcement officers involved in customs or excise activities. *See* Br. in Opp. at 6-7.

The Government overlooks, however, that CAFRA is inapplicable in cases, like Mr. Bramwell's, that do not

involve forfeiture proceedings. CAFRA's effective-date provision states, in pertinent part, that

> this Act and ***the amendments made by this Act*** shall apply to any ***forfeiture proceeding*** commenced on or after the date that is 120 days after the date of the enactment of this Act.

CAFRA § 21, 114 Stat. at 225 (codified at 8 U.S.C. § 1324 note) (emphasis added). *See also* 146 Cong. Rec. at H2051 (daily ed. Apr. 11, 2000) (statement of Rep. Hyde) (reproducing Congressional Budget Office discussion of CAFRA's effective-date provision). Consequently, not only is CAFRA inapplicable to Mr. Bramwell's case, it was inapplicable in each post-amendment case in which the Government asserts it was interpreted. *See Chapa v. United States DOJ*, 339 F.3d 388 (5th Cir. 2003); *Hatten v. White*, 275 F.3d 1208 (10th Cir. 2002); *O'Ferrell v. United States*, 253 F.3d 1257 (11th Cir. 2001); Br. in Opp. at 6.

Even if CAFRA were applicable in non-forfeiture-related cases, it does not, as the Government contends, supercede the jurisprudence addressing the pre-CAFRA statute. Section 2680(c) presently provides (with the pertinent CAFRA additions emphasized):

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, ***or other property*** by any officer of customs or excise or any other law enforcement officer, ***except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –***

> ***(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;***
>
> ***(2) the interest of the claimant was not forfeited;***
>
> ***(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and***
>
> ***(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law*[.]**

28 U.S.C. § 2680(c) (emphasis added). *See also* 28 U.S.C. § 2680(c) (1994). The new language does not affect in any way the language at issue in this case. It merely ensures that Section 2680(c) cannot foreclose claims related to property that had been detained for forfeiture, if the enumerated conditions are met. It says nothing about the types of activities in which law-enforcement officers must be engaged for Section 2680(c) to immunize the United States from suit.

CAFRA's legislative history confirms the amendment's limited purpose, and that it was ancillary to Congress's desire to completely overhaul forfeiture laws and procedures. The House Judiciary Committee's report identifies CAFRA's "Purpose and Summary" as "creat[ing] general rules relating to federal civil forfeiture proceedings designed to increase the due process safeguards for property owners whose property has been seized." H.R. Rep. No. 106-192, at 2 (1999). *See also* 146 Cong. Rec. S1759-62

(daily ed. Mar. 27, 2000). The Committee's only discussion of Section 2680(c) was to state:

> The bill amends the Federal Tort Claims Act to allow for tort claims against the United States government based on the destruction, injury, or loss of goods, merchandise, or other property while in the possession of any law enforcement officer ***if the property had been seized for the purpose of forfeiture***.

H.R. Rep. No. 106-192, at 18 (emphasis added). There would presumably have been at least some discussion of the divergence of the courts of appeals on the meaning of "other law enforcement officer" had Congress contemplated that CAFRA would affect that provision in any way.

Despite the amendment's plain text and purpose, the Government maintains that the current language "differ[s] in respects that are relevant to the issue here." Br. in Opp. at 6. It first assigns significance to the insertion of "or other property" following "goods or merchandise[,]" asserting that it would make it "difficult for a court to construe the term 'other law enforcement officer' narrowly on the theory that the only officers who detain 'goods or merchandise' are those who are acting in a tax, excise, or customs capacity." Br. in Opp. at 7. This discussion, however, is more aptly described as an attempt to rebut the interpretation of Section 2680(c) that Mr. Bramwell proposes. Unless the Government is implicitly conceding that it was ***not*** difficult to interpret "other law enforcement officer" narrowly pre-CAFRA, this analysis cannot be describing a substantive difference between the statute's current language and that interpreted by the courts of appeals pre-CAFRA.

The Government next cites the predominant change to the statute – the forfeiture exception – but again fails to identify a change to the pertinent language. The Government reasons that because federal law-enforcement officers seize property for forfeiture in circumstances outside of customs and excise, "CAFRA reinforces the view that a broad group of law-enforcement agents are presumptively excepted from the FTCA's coverage[.]" Br. in Opp. at 7. Once again, the Government is simply citing CAFRA as support for its interpretation of the scope of "other law enforcement officer" in the original, unchanged language at issue.

Moreover, it is evident that the courts of appeals do not discern a substantive difference in Section 2680(c)'s pertinent language. Post-CAFRA Section 2680(c) governed Mr. Bramwell's case from its onset, but the Ninth Circuit supported its holding by citing to appellate decisions involving ***both*** versions of the statute. *See* Pet. App. at 4-5 (Ninth Circuit opinion), 9 (district court noting that action was filed in July 2001); CAFRA § 21, 114 Stat. at 225 (delineating CAFRA's applicability). Indeed, in the very cases cited by the Government as proof of post-CAFRA circuit uniformity, each court relied exclusively on precedent interpreting the ***pre-CAFRA*** statute, and ***omitted the forfeiture-exception provisions when reciting Section 2680(c)***, no doubt because they, quite properly, believed them irrelevant. *See Chapa*, 339 F.3d at 390 (citing only pre-CAFRA cases); *Hatten*, 275 F.3d at 1210 (citing *Crawford v. United States DOJ*, 123 F.Supp.2d 1012, 1013 (S.D. Miss. 2000)); *O'Ferrell*, 253 F.3d at 1271 (citing *Schlaebitz v. United States DOJ*, 924 F.2d 193, 194 (11th Cir. 1991)).

The Government concludes by citing cases involving Section 2680(c) in which the Court has recently denied writs of *certiorari*, and hypothesizing that the Court did so because it wishes to provide the minority-rule courts – the Sixth, Seventh, and D.C. Circuits – an opportunity to address the amended language. Br. in. Opp. at 8-9. It is much more likely, however, that the Court denied those petitions because the petitioners – all incarcerated and proceeding *pro se* – lacked the training and resources to effectively identify the flaws in the Government's position. In any event, if the Sixth, Seventh, and D.C. Circuits were to follow the lead of the *Chapa*, *Hatten*, and *O'Ferrell* courts and rely on cases addressing the pre-CAFRA statute when they next encounter Section 2680(c), they will continue to limit the non-forfeiture-related provision to officers engaged in customs or excise activities. *See Ortloff v. United States*, 335 F.3d 652, 660 (7th Cir. 2003); *Bazuaye v. United States*, 83 F.3d 482, 486 (D.C. Cir. 1996); *Kurinsky v. United States*, 33 F.3d 594, 598 (6th Cir. 1994). Consequently, the Court will ultimately have to resolve the circuit split, and should choose to do so now.

II. *Kosak v. United States* Cannot Be Read To Transform Every Law-Enforcement Contact With Property Into A "Detention."

The Government asserts that the Court's holding in *Kosak v. United States*, 465 U.S. 848 (1984), that Section 2680(c) governs claims arising from "negligent handling or storage" of property reaches to unknowing possession of property. Br. in Opp. at 9. The effect of such a conclusion would be to create a "detention" every time an officer touches property. In *Kosak*, however, there was no question that the property had been detained; Kosak even

conceded this. *See Kosak*, 465 U.S. at 849-50, 853 n.8. Consequently, *Kosak*'s "negligent handling or storage" holding does not control unless there has been a "detention" of property. *See Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("since we have never squarely addressed the issue, . . . we are free to address the issue on the merits."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

The Government concludes by arguing that "[w]hile the officers may not have known what was in the pockets of petitioner's coat, they certainly intended to detain both the coat and anything left in the pockets. . . . " Br. in Opp. at 9. This contention begs the question. Although the record does not reveal if Mr. Bramwell was placed in "disciplinary segregation" or "administrative detention,"[1] the controlling regulations did not foreclose return of his non-contraband property upon his request. *See* 28 C.F.R. §§ 541.21(c)(7), 541.22(d) (2003) (not prohibiting return of impounded property). Thus, Mr. Bramwell's coat was "detained" only if "detention" includes situations where the property must be returned to its owner on demand. Even then, his eyeglasses would not be "detained" unless "detention" covers items the officer did not even know he or she possessed. Perhaps "detention" does encompass such situations, but neither courts nor claimants can be sure until the Court construes the term.

[1] *See* 28 C.F.R. §§ 541.20-541.22 (2003) (defining and governing disciplinary segregation and administrative detention).

CONCLUSION

For the reasons stated herein and in Mr. Bramwell's petition, the Court should issue a writ of *certiorari*.

Respectfully submitted,

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